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## Letter Ruling 95-3: Application of the Deeds Excise to a Lease Financing Transaction

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March 10, 1995

You request a letter ruling concerning the application of the Massachusetts deeds excise to a lease financing transaction involving your client, \*\*\*\*\* Corporation.

### I. FACTS

The facts set forth in your ruling request are summarized as follows. The parties to the transaction are \*\*\*\*\* Corporation ("Company"), \*\*\*\*\* Corporation ("Parent"), \*\*\*\*\* Bank and Trust Company, acting solely in the capacity of trustee ("Trustee"), and the \*\*\*\*\* ("Seller"), the record fee owner of real property ("Property") consisting of an existing hotel, the land on which it is located, as well as furniture, fixtures and equipment.

Trustee will acquire the Property from Seller for a total cost of approximately \$92 million and lease the Property to Company. Trustee will issue debt instruments (A-notes, equal to 80% of the acquisition cost, B-notes equal to 14% of the acquisition cost, and certificates equal to 6% of the acquisition cost) secured by the property and the lease. Parent will guaranty Company's payment and performance obligations under the lease. Subsequent to the closing between Seller and Trustee, the Trustee will issue construction notes for an additional \$100.6 million to finance the renovation of the Property. The construction notes will be converted to A-notes and B-notes when the renovations are completed.

The term of the lease between Trustee and Company is 7 years. At any time before the last twelve months of the term of the lease, the Company has the right to terminate the Lease by purchasing the Property for an amount equal to the outstanding principal and accrued interest on the notes, plus all rents due and payable and all closing costs incident to the purchase ("Offer Purchase Price"). At the termination of the lease, the Company may either purchase the Property for the applicable Offer Purchase Price or make a final payment to the Trustee in an amount equal to the outstanding principal and interest on the A-notes. You represent that the Offer Purchase Price at the termination of the lease will be approximately \$192 million.

The Company, Trustee and holders of the notes have agreed to treat the Company as the owner of the property for federal, state, and local income tax purposes.

### II. RULING

The sale of the Property from Seller to Trustee is subject to the deeds excise. However, the transfer of the Property from Trustee to Company upon termination of the lease is not subject to the deeds excise.

### III. DISCUSSION

Massachusetts General Laws Chapter 64D, § 1, provides that there shall be levied, collected and paid an excise upon a "deed, instrument, or writing, whereby any lands, tenements or other realty sold shall be granted assigned, transferred or otherwise conveyed to, or vested in, the purchaser or purchasers ... when the consideration of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds one hundred dollars."

In determining if the deeds excise is applicable, the Department looks at the substance rather than the form of a transaction. Thus, although there was no transfer of record title, the Department has ruled that transfers of ownership of cooperative apartments<sup>[1]</sup> and leases for extended periods<sup>[2]</sup> were subject to the deeds excise. On the other hand, the Department has stated that a reconveyance of real property from a building and loan association to the owner in conjunction with a loan transaction was not subject to the deeds excise, although there was a change in record title.<sup>[3]</sup>

Because the language of G.L. c. 64D is identical to Section 4361 of the Internal Revenue Code which was repealed effective January 1, 1968, the Department in the past has sometimes looked to federal regulations and rulings for guidance. Where an investor provided funds to construct a building and then leased it to a government agency until the agency repaid the construction funds, the subsequent conveyance of the building to the agency by the investor was characterized as a release of a security interest and not subject to the federal documentary stamp tax. Rev. Rul. 64-2950, 1964-2 C.B. 446.

A number of federal cases have analyzed the federal income tax implications of lease financing arrangements. Generally, one line of cases disregards both record title and the characterization of the transaction by the parties and treats the lessee as the owner of the realty entitled to claim applicable income tax deductions. See Helvering v. F. & R. Lazarus & Co., 308 U.S. 252 (1939) and Rev. Rul. 68-590, 1968-2 C.B. 66. However, another line of cases holds that in a genuine multiple-party transaction with economic substance resulting from business or regulatory considerations, which is not structured solely for tax-avoidance purposes, the form of the transaction adopted by the parties controls for tax purposes. See Frank Lyon Co. v. United States, 435 U.S. 561 (1978).

### IV. CONCLUSION

The substance of this transaction is the acquisition of the Property by the Company with the acquisition and renovation cost being financed by a number of investors whose interests are protected by the Trustee. While the federal income tax cases are not controlling here, the reasoning in both the Lazarus and Lyon cases is consistent with the Company being treated as the owner during the course of the lease and at its termination. Thus, the transfer of the Property from the Trustee to the Company is not subject to the deeds excise.

Very truly yours,

/s/ Mitchell Adams

Mitchell Adams  
Commissioner of Revenue

MA:HMP:ecl

LR 95-3

[\[1\]](#) See Letter Ruling 90-1.

[\[2\]](#) See Letter Ruling 79-52.

[\[3\]](#) See Letter Ruling 89-12.